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U.S. Copyright Office

37 CFR Parts 201, 203, and 210

[Docket No. 2018-10]

Notices of Intention and Statements of Account under Compulsory License to Make and Distribute Phonorecords of Musical Works

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office is issuing final regulations pursuant to the Musical Works Modernization Act, title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. This rule adopts previously issued interim regulations as final. The interim rule amended the Office’s prior regulations pertaining to the compulsory license to make and distribute phonorecords of musical works so as to conform the prior regulations to the new law, including with respect to the operation of notices of intention and statements of account. In addition to adopting the interim rule as final, this final rule makes further technical changes to update cross-references to regulations that were recently amended by the Copyright Royalty Judges.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov, Steve Ruwe, Assistant General Counsel, by email at sruwe@copyright.gov, or Jason E. Sloan,

Assistant General Counsel, by email at jslo@copyright.gov. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION: On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”) which, among other things, substantially modified the compulsory “mechanical” license for making and distributing phonorecords of nondramatic musical works available under 17 U.S.C. 115.¹ On December 7, 2018, the Copyright Office published in the Federal Register an interim rule amending the Office’s section 115-related regulations to harmonize them with the MMA’s requirements, and to make other minor technical updates.² The amendments largely concerned statements of account and notices of intention to obtain a compulsory license. The Office did not receive any comments from the public in response to the interim rule. As a result, the Office is adopting the amendments promulgated through the interim rule as final without change.

In addition to adopting the interim rule as final, the final rule makes further technical changes to update cross-references to regulations that were recently amended by the Copyright Royalty Judges (“CRJs”). On February 5, 2019, the CRJs published in the Federal Register a final determination in *In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, Docket No. 16-CRB-0003-PR (2018-2022).³ The CRJs’ final determination amended 37 CFR part 385, which contains regulations setting forth the rates and terms of royalty payments for use of the section 115 license. The CRJs’ changes have rendered obsolete some of the cross-

¹ Pub. L. 115-264, 132 Stat. 3676 (2018).

² 83 FR 63061 (Dec. 7, 2018).

³ 84 FR 1918 (Feb. 5, 2019).

references to part 385 contained in the Copyright Office's regulations governing statements of account under the section 115 license, and the final rule updates the relevant cross-references.

Because the updates are technical and non-substantive changes that do not "alter the rights or interests of parties," they are not subject to the notice and comment requirements of the Administrative Procedure Act.⁴ Furthermore, the Office finds good cause that providing notice and comment is "impracticable" and "contrary to the public interest" in this instance because the CRJs' new regulations are already effective, and delaying removal of the obsolete cross-references in the Office's regulations may cause confusion among those parties required to serve statements of account under the compulsory license.⁵ For these same reasons, the Office finds it appropriate to make the final rule effective upon publication.⁶

List of Subjects

37 CFR Part 201

Copyright, General provisions.

37 CFR Part 203

Freedom of information.

37 CFR Part 210

Copyright, Phonorecords, Recordings.

Final Regulations

⁴ See *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014); 5 U.S.C. 553(b) (notice and comment not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

⁵ See 5 U.S.C. 553(b).

⁶ See *id.* at 553(d).

For the reasons set forth above, the Copyright Office adopts the interim rule amending 37 CFR parts 201, 203, and 210 which was published at 83 FR 63061 on December 7, 2018, as final with the following changes:

**PART 210—COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING
PHYSICAL AND DIGITAL PHONORECORDS OF NONDRAMATIC MUSICAL
WORKS**

1. The authority citation for part 210 continues to read as follows:

Authority: 17 U.S.C. 115, 702.

§ 210.16 [Amended]

2. Amend § 210.16 as follows:

a. In paragraph (b)(8):

i. In the first sentence, remove “records of any promotional uses of the copyright owner’s works that are required to be maintained or provided under §385.14 or §385.24 of this title, or other applicable provision, including, where applicable, records required to be maintained or provided by any third parties that were authorized by the compulsory licensee to engage in promotional uses during” and add in its place “records of any promotional or free trial uses of the copyright owner’s works that are required to be maintained or provided under applicable provisions of part 385 of this title, or any other provisions, including, where applicable, records required to be maintained or provided by any third parties that were authorized by the compulsory licensee to engage in such uses during”.

- ii. In the second sentence, remove “subject to the promotional royalty rate provided in §385.14 or §385.24 of this title, or any similar promotional royalty rate of zero” and add in its place “subject to any promotional or free trial royalty rate of zero”.
- b. In paragraph (c)(1), remove “subject to part 385, subpart A of this title or any other provisions requiring” and add in its place “subject to applicable provisions of part 385 of this title, or any other provisions, requiring”.
- c. In paragraph (c)(2), remove “subject to part 385, subparts B or C of this title, or any other provisions requiring computation of applicable royalties on a percentage-rate basis, include a detailed and step-by-step accounting of the calculation of royalties under §385.12, §385.22, or other provisions of part 385 of this title as applicable, sufficient” and add in its place “subject to applicable provisions of part 385 of this title, or any other provisions, requiring computation of applicable royalties on a percentage-rate basis, include a detailed and step-by-step accounting of the calculation of royalties under applicable provisions of part 385 of this title, sufficient”.
- d. In paragraph (d)(2), remove “subject to part 385, subpart A of this title, or any other applicable royalties computed on a” and add in its place “subject to applicable provisions of part 385 of this title, or any other provisions, requiring computation of applicable royalties on a”.
- e. In paragraph (d)(2)(v), remove “set forth in §385.3 or other provisions of part 385 of this title as applicable” and add in its place “set forth in applicable provisions of part 385 of this title”.
- f. In paragraph (d)(3), remove “subject to part 385, subparts B or C of this title, or any other applicable royalties computed on a percentage-rate basis, the amount of the royalty

payment shall be calculated as provided in §385.12, §385.22, or other provisions of part 385 of this title as applicable” and add in its place “subject to applicable provisions of part 385 of this title, or any other provisions, requiring computation of applicable royalties on a percentage-rate basis, the amount of the royalty payment shall be calculated as provided in applicable provisions of part 385 of this title”.

g. In paragraph (d)(3)(ii), remove “as described in §385.12(b)(4), §385.22(b)(3), or any similar provisions of part 385 of this title as applicable, an” and add in its place “as described in applicable provisions of part 385 of this title, an”.

§ 210.17 [Amended]

3. Amend § 210.17 as follows:

- a. In paragraph (c)(6), remove “pursuant to part 385, subparts B or C of this title, or any other provision requiring computation of applicable royalties on a percentage-rate basis, calculations showing in detail how the royalty was computed (for these purposes, the applicable royalty as specified in part 385, subpart A of this title shall” and add in its place “pursuant to applicable provisions of part 385 of this title, or any other provisions, requiring computation of applicable royalties on a percentage-rate basis, calculations showing in detail how the royalty was computed (for these purposes, the applicable royalty as specified in applicable provisions of part 385 of this title, or any other provisions, requiring computation of applicable royalties on a cents-per-unit basis shall”.
- b. In paragraph (d)(1), remove “subject to part 385, subpart A of this title, or any other provision requiring” and add in its place “subject to applicable provisions of part 385 of this title, or any other provisions, requiring”.

c. In paragraph (d)(2)(i), remove “subject to part 385, subparts B or C of this title, or any other provision requiring” and add in its place “subject to applicable provisions of part 385 of this title, or any other provisions, requiring”.

Dated: March 11, 2019.

Karyn A. Temple,
Acting Register of Copyrights and
Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,
Librarian of Congress.

[BILLING CODE 1410-30-P]

[FR Doc. 2019-05548 Filed: 3/21/2019 8:45 am; Publication Date: 3/22/2019]